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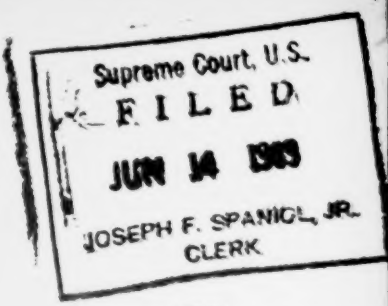


NO.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

PETE ROBERTS,

Petitioner,

v.

SUN EXPLORATION AND PRODUCTION COMPANY,
a Delaware Corporation,

Respondent.

WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. Are the federal courts precluded from adjudicating a contract dispute under a collective bargaining agreement that contains no provisions for binding arbitration?

2. Can the jurisdiction of federal courts under 29 U.S.C. § 185 (1982) (Labor Management Relations Act) be deferred to a dispute resolution procedure that has no provision for arbitration or independent review?

3. Does a collective bargaining agreement that provides for dispute resolution by the unilateral decision of management, and deferral to that procedure as final by the trial courts, violate the intent

of 29 U.S.C. § 185 and/or violate the Petitioner's right to due process?

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NO. _____

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable William H. Rehnquist, Chief Justice, and Associate Justices of the Supreme Court of the United States.

Pete Roberts, the Petitioner herein, prays that a writ of certiorari be issued to review the judgment of the United

States Court of Appeals, Tenth Circuit entered in the above entitled case on March 20, 1989.

## OPINIONS BELOW

The opinion of the United States Court of Appeals, Tenth Circuit is unreported and is printed in the Appendix at A-3. The Order of the United States District Court for the Western District of Oklahoma is printed in the Appendix at A-5.

## JURISDICTION

The judgment of the United States Court of Appeals, Tenth Circuit (A-3) was entered on March 20, 1989. The jurisdiction of the Court is invoked under 28 U.S.C. § 2101(C).

## STATUTES INVOLVED

29 U.S.C. § 185. Suits by and against labor organizations:

> (a) Venue, amount, and citizenship. Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.
>
> (b) Responsibility for acts of agent - Entity for purposes of suit - Enforcement of money judgment. Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organiza-

tion in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) Jurisdiction. For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) Service of process. The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency. For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make

> such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

Fifth Amendment, United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## STATEMENT OF THE CASE

Petitioner filed suit in the United States District Court for the Western District of Oklahoma. Damages were

sought for the wrongful termination of his employment. Jurisdiction existed under 29 U.S.C. § 185.

Respondent contended that the grievance procedure in the collective bargaining agreement was binding and the exclusive remedy. No procedure was contained in the agreement for arbitration or independent review of the grievance. The final step of the procedure was to request review by Respondent's vice-president.

The Trial Court granted summary judgment because it found Petitioner had not complied with the grievance procedure. The Respondent admitted on appeal to the United States Court of Appeals for the Tenth Circuit that Petitioner had complied with the grievance procedure. The Respondent contended in that Court

that the procedure was exclusive and precluded the Court from exercising jurisdiction conferred by 29 U.S.C. § 185.

The Tenth Circuit affirmed, summarily, in an unpublished opinion.

## REASONS FOR GRANTING WRIT

1. This Court has deferred its right to adjudicate contract disputes under 29 U.S.C. § 185 to arbitration proceedings if the collective bargaining agreement so provides. However, the current opinion extends that deferral beyond the legislative intent, thereby allowing a means of dispute resolution without a provision for arbitration or other independent review. Such deferral has never been authorized or sanctioned by this Court.

Whether such deferral should be so sanctioned is of major impact upon interstate commerce as it is affected by collective bargaining agreements and is of such departure from the normal arbitration process so as to call for an exercise of this Court's power of supervi-

sion.

2. The opinion in this case is a departure from previous decisions of the United States Court of Appeals, Tenth Circuit. That Court had previously held that the district courts were not precluded from adjudicating disputes if the collective bargaining agreement did not contain a provision for binding arbitration. United Brotherhood of C & J v. Hensel Phelps Construction Co., 376 F.2d 731 (10th Cir. 1967); Line Drivers Local No. 961 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America v. W.J. Digby, Inc., 341 F.2d 1016 (10th Cir. 1965).

The Eighth Circuit has likewise required an impartial arbiter. Brown v. Sterling Aluminum Products Corp., 365 F.2d 651 (8th Cir. 1966). Other circuit

courts of appeal seem to be in conflict. Fortune v. National Twist Drill & Tool Division, Lear Siegler, Inc., 684 F.2d 374 (6th Cir. 1982); United Mineworkers v. Barnes & Tucker Co., 561 F.2d 1093 (3d Cir. 1977); Electrical Contractors Association v. Local 103, International Brotherhood of Electrical Workers, 458 F.2d 590 (1st Cir. 1972); Lomax v. Armstrong Cork Co., 533 F.2d 1277 (5th Cir. 1970).

The seeming departure from its previous opinions by the Tenth Circuit in the present case exemplifies the confusion of the lower courts on the issue. The Fifth Circuit has likewise issued conflicting opinions, compare, e.g., Smith v. Kerrville Bus Co., 748 F.2d 1049 (5th Cir. 1984), with Haynes v. United States Pipe & Foundry Co., 362 F.2d 414

(5th Cir. 1966).

This Court should grant certiorari to rectify the conflicting decisions among and within the different federal courts of appeal.

## CONCLUSION

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: _____

NO.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

PETE ROBERTS,

Petitioner,

v.

SUN EXPLORATION AND PRODUCTION COMPANY,
a Delaware Corporation,

Respondent.

WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

# APPENDIX

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UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

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| | | |
|---|---|---|
| PETE ROBERTS,<br>Plaintiff-Appellant, | ) | No. 87-2019 |
| v. | ) | (D.C. No. CIV-86-176-9-T)<br>(W.D. Okla.) |
| SUN EXPLORATION AND PRODUCTION COMPANY, a Delaware corporation,<br>Defendant-Appellee. | ) | Filed March 20, 1989 |

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ORDER AND JUDGMENT*

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Before MOORE, TACHA and BALDOCK, Circuit Judges.

This is an appeal from an order of

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*This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

the district court granting summary judgment in favor of the defendant. This case arises out of the plaintiff's termination from employment by the defendant and the effect of the grievance procedures in the collective bargaining agreement upon the defendant's ability to proceed in federal court. We affirm the district court's conclusions that the plaintiff's claim is preempted by federal law and that the grievance procedures in the collective bargaining agreement are deemed to be the exclusive means to raise issues related to the plaintiff's termination.

AFFIRMED.

ENTERED FOR THE COURT

Deanell Reece Tacha
Circuit Judge

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF OKLAHOMA

| | | |
|---|---|---|
| PETE ROBERTS, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | Case No. |
| | ) | CIV-86-1769-T |
| | ) | |
| SUN EXPLORATION AND PRODUCTION COMPANY, a Delaware corporation, | ) | |
| | ) | |
| Defendant. | ) | |

O R D E R

Before the Court is the defendant's Motion for Summary Judgment. The plaintiff has responded in opposition. The plaintiff's Complaint (actually styled "Petition" by plaintiff) alleges jurisdiction through diversity of citizenship and alleges that he was discharged from his employment without just cause. He claims that the discharge was motivated by bad faith and/or malice, thereby vio-

lating the public policy of the State of Oklahoma and the United States. The plaintiff therefore seeks relief under a cause of action founded in state law. The basis of the defendant's Motion for Summary Judgment is that this cause is preempted by federal law, § 301 of the Labor Management Relations Act, because of the existence of a collective bargaining agreement outlining the terms of plaintiff's employment with the defendant. See 29 U.S.C. § 185. In response, the plaintiff contends that the collective bargaining agreement does not contain a grievance procedure which pertains to disputes over employee discharge. He further contends that the absence of a provision in the agreement requiring arbitration distinguishes this case from the Supreme Court decision of Altis-Chal-

mers Corp. v. Lueck, 471 U.S. 202 (1985), which held that when the resolution of a state law claim is substantially dependent upon analysis of the terms of a collective bargaining agreement, that claim must either be treated as a § 301 claim or dismissed as preempted by federal labor contract law. However, plaintiff's analysis of the collective bargaining agreement in the instant case and the applicable law is unpersuasive.

Article VI of the collective bargaining agreement at issue in this case provides: "Section 1. For the purpose of settling grievances and disputes arising over the interpretation or application of this Agreement, it is agreed that the following procedure shall govern: . . . ." Therein a five-step procedure is given for an employee to follow for

settlement of disputes and grievances. The plaintiff contends that this procedure does not encompass disputes over discharge of employees because it purports to relate only to disputes over the "interpretation or application" of the agreement. However, § 1 of Article VI cannot be read so narrowly. This Court interprets § 1 to mean that the section on settlement of disputes and grievances relates to any dispute which might arise over any of the subjects encompassed by the agreement itself. Article III, § 2 provides that the management of the company will be subject to the express provisions of the agreement, "including the grievance procedures." A nonexclusive list is then given as to management's responsibilities, which includes "the right to promote, demote, lay off, re-

call, discipline or discharge employees for just cause. . . ." If the settlement of disputes and grievances section, found in Article VI, related only to the narrow issue of how to interpret or apply this agreement, it appears to this Court that Article III, as well as all other articles contained in the collective bargaining agreement, would become a nullity. Plaintiff claims that this collective bargaining agreement is nonexclusive because of § 3 of Article VI, which provides as follows: "Nothing contained in this Article VI shall be construed to prohibit or prevent any employee or group of employees from individually presenting grievances to the Company and having such grievances settled without the intervention of an Association representative, so long as the decision is not inconsistent

with the terms of this agreement; provided that the Association has been given an opportunity to be present at such adjustment." Section 3, however, does not provide that the employee can go outside the grievance procedure outlined in the bargaining agreement by first filing his case in federal district court.

The Court finds that this case is preempted by federal law, as outlined by the Allis-Chalmers case, supra. The absence of an arbitration agreement in the collective bargaining agreement in the instant case is irrelevant. The significant point to be made herein is that the defendant provided a means of settling employee/employer disputes. If it chose not to include arbitration as one means of settling this type of dis-

pute, it makes the procedures contained therein no less important. The plaintiff's failure to pursue his grievance according to the procedures outlined in the agreement precludes this Court from assuming jurisdiction over his case.

IT IS THEREFORE ORDERED that the defendant's Motion for Summary Judgment should be and is hereby granted.

IT IS FURTHER ORDERED that the plaintiff's Application for Certification to the Oklahoma Supreme Court is denied as moot.

IT IS SO ORDERED this 19th day of June, 1987.

/s/ Ralph G. Thompson
United States District
Judge

Entered in Judgment Docket on June 19, 1987

Supreme Court, U.S.
FILED
JUL 14 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-2033

In The

# Supreme Court of the United States

October Term, 1988

PETE ROBERTS,

*Petitioner,*

v.

SUN EXPLORATION AND PRODUCTION COMPANY, a Delaware Corporation,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

May federal courts examine the merits of a claim under 29 U.S.C. §185 where the matter has been resolved in accordance with a collectively bargained grievance procedure which does not include binding arbitration?

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## COUNTER-STATEMENT OF THE CASE

Pete Roberts ("Roberts") is the petitioner. Oryx Energy Company, a Delaware corporation, formerly Sun Exploration and Production Company, a Delaware corporation ("Sun"), is the respondent.[1]

Roberts filed a complaint[2] against Sun in the United States District Court for the Western District of Oklahoma alleging wrongful discharge. The terms and conditions of Roberts' employment were governed by a collective bargaining agreement between Sun and Roberts' bargaining representative, the Sun Exploration and Production Company Employees Association ("Association"). Roberts, as a member of the bargaining unit, was bound by the terms of the collective bargaining agreement. The agreement contained a five step grievance procedure for resolving disputes, such as disciplinary action taken against bargaining unit members. The grievance procedure was exclusive. The grievance procedure steps included review

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[1] Pursuant to Supreme Court Rule 28.1, the respondent discloses the following information: Sun Exploration and Production Company, a Delaware corporation, was renamed Oryx Energy Company on May 3, 1989. Oryx Energy Company is the managing general partner and principal owner of Sun Operating Limited Partnership, a Delaware limited partnership. Oryx Energy Company has no other parent, subsidiary or affiliated companies. The respondent will be referred to by its designation in the lower courts.

[2] The complaint was actually styled as a petition, but will be referred to herein as a complaint. The complaint alleged diversity jurisdiction contrary to the assertion of federal question jurisdiction alleged by Roberts in the writ for certiorari. *Compare* Writ for Certiorari, p. 6 and Appendix, p. A-5.

by the Governing Board of the Association, and culminated in final review by Sun's Vice President for Production Operations. The parties to the collective bargaining agreement chose to exclude arbitration as the final step in the grievance procedure. Roberts' discharge was reviewed in accordance with the agreed upon grievance procedure,[3] and his discharge was upheld by Sun's Vice President for Production Operations.

The United States District Court for the Western District of Oklahoma granted Sun's motion for summary judgment, holding that the case was preempted by § 301 of the Labor Management Relations Act, 1947 ("LMRA"), 61 Stat. 156, 29 U.S.C. § 185 (1982). The United States Court of Appeals for the Tenth Circuit affirmed the district court's conclusion that Roberts' claim was preempted by federal labor law. The Tenth Circuit held that the grievance procedure contained in the collective

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[3] There was some confusion at the district court level concerning whether Roberts did exhaust his remedies under the grievance procedure. As noted in the briefs on the motion for summary judgment, Roberts did *not* exhaust his remedies concerning his *suspension*, but did follow the grievance procedure and thereby exhaust his remedies with respect to his discharge. The district court was apparently confused when it held that Roberts failed to pursue his grievance under the collective bargaining agreement. *See* Appendix, A-11. However, the Tenth Circuit was apprised of this issue and affirmed the districts court's determination that Roberts' claim was preempted and that the grievance procedure in the collective bargaining agreement was the exclusive means of raising issues relating to his termination. *See* Appendix, A-4, and Brief of the Appellee, pp. 12-13, Tenth Circuit Case No. 87-2019.

bargaining agreement was the exclusive means of resolving the issues relating to Roberts' termination.

## REASONS FOR DENYING THE WRIT

Supreme Court Rule 17.1 provides that a writ of certiorari will be granted "only when there are special and important reasons therefore." Roberts has not asserted any such "special and important reasons" in his Petition for Writ of Certiorari.

Roberts' primary contention is that the federal courts must make themselves available for the parties to litigate all disputes arising under a collective bargaining agreement if the agreement's grievance procedure does not conclude with binding arbitration. Roberts asserts that there is a split among the circuits on whether his contention is correct.

This Court's interpretations of the LMRA and its legislative history indicate that collective bargaining agreements may properly contain a grievance procedure which does not include binding arbitration. This Court has ruled that if a party has pursued his grievance to the final step in the procedure, the federal courts may not reexamine the merits of the grievance. Furthermore, there is no split among the circuits on whether a grievance procedure must contain a provision for binding arbitration to preclude litigation of disputes submitted to the court.

## PROPOSITION ONE: THE LMRA PROVIDES THAT PARTIES MAY AGREE ON A GRIEVANCE PROCEDURE WHICH DOES NOT INCLUDE BINDING ARBITRATION.

A party may bring an action for breach of a collective bargaining agreement under § 301 of the LMRA. *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962). However, if the grievance procedure contained in the collective bargaining agreement provides for a final and binding decision of disputes submitted to it, then a dispute finally resolved under that procedure may not be reviewed on the merits by the federal courts. *See Paperworkers v. Misco, Inc.*, 484 U.S. 29 (1987); *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 164 (1983), citing *W.R. Grace & Co. v. Local 759*, 461 U.S. 757, 764 (1983); *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976). A federal court may review a decision rendered under a final and binding grievance procedure only to determine whether the decision drew its essence from the collective bargaining agreement and to ascertain whether the grievant's union breached its duty of fair representation.[4] *Vaca v. Sipes*, 386 U.S. 171, 186 (1967); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599 (1960).

Section 203(d) of the LMRA, 61 Stat. 154, 29 U.S.C. § 173(d) (1982), provides that the "method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining

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[4] In the present case, Roberts did not alleged either of these exceptions to the finality rule at the district court level, nor did he allege the exceptions on appeal until his reply brief to the Tenth Circuit.

agreement." Congress specifically rejected the requirement that disputes under the LMRA be resolved by means of compulsory arbitration. *See* Sen. Rep. No. 105, April 17, 1947, 80th Cong., 1st Sess. 1, reprinted in Legislative History of the Labor Management Relations Act, 1947, at pp. 434-35; 1947 U.S. Code Cong. & Ad. News 1135, 1168-1169.

This Court has construed the LMRA as requiring the lower federal courts to defer to whatever procedure for settling disputes is contained in the collective bargaining agreement, even if that procedure does not conclude with binding arbitration. *See General Drivers Union v. Riss & Co.*, 372 U.S. 517, 521 (1963); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 565 (1960). This Court's decisions support the sound labor policy of allowing the parties to determine their own grievance procedure through the collective bargaining process. This principle was clearly stated in *Huffman v. Westinghouse Elec. Corp.*, 752 F.2d 1221 (7th Cir. 1985):

> Collective bargaining is a process by which both the union and the employer concede certain points in order to gain advantages elsewhere. If the grievance procedure under this contract favors the employer, the Union (and therefore the employees) presumably gained something in return. We do not, therefore, find convincing the employees' argument that they should be able to escape the terms of the contract the Union bargained for them because another contract might have been more favorable.

*Huffman*, 752 F.2d at 1226.

The absence of binding arbitration from a grievance procedure does not warrant the federal courts to

reexamine the merits of a case which has already been resolved under the agreed upon procedure.

## PROPOSITION TWO: THE ALLEGED CONFLICTING DECISIONS OF THE CIRCUITS RELIED UPON BY ROBERTS ARE DISTINGUISHABLE.

Roberts asserts that the circuits have rendered conflicting decisions on whether a grievance procedure must include binding arbitration to invoke the finality rule under § 301 of the LMRA. Petition for Writ of Certiorari, p. 11. The First, Third, Fifth, Sixth, Seventh and Tenth Circuits have all held that binding arbitration is not required for the finality rule to be invoked. *See Huffman*, 751 F.2d at 1226; *Fortune v. National Twist Drill & Tool Div.*, 684 F.2d 374, 375 (6th Cir. 1982); *United Mine Workers v. Barnes & Tucker Co.*, 561 F.2d 1093, 1096 (3rd Cir. 1977); *Electrical Contr. Ass'n v. International Brotherhood of Electrical Workers*, 458 F.2d 590, 592 (1st Cir. 1972); *Lomax v. Armstrong Cork Co.*, 433 F.2d 1277, 1280-1281 (5th Cir. 1970); *Haynes v. United States Pipe & Foundry Co.*, 362 F.2d 414, 418 (5th Cir. 1966); and the opinion of the Tenth Circuit in the present case.

Roberts cites *Brown v. Sterling Aluminum Products Corp.*, 365 F.2d 651 (8th Cir. 1966), for the proposition that an impartial arbiter is required for the finality rule to be invoked. Petition for Writ of Certiorari, p. 9. However, the grievance procedure in *Brown* did not contain a provision for a final and binding decision, and as such is distinguishable from the grievance procedure in the present case.

In *Brown*, the appellants were seeking the specific enforcement of a general agreement to discuss grievances contained in the collective bargaining agreement at issue. The third and final step of the grievance procedure in *Brown* provided that if the parties were unable to settle the matter, they would diligently and in good faith explore some other method for the final disposition of the dispute. *Brown*, 365 F.2d at 658. The court held that the federal judiciary should not be used to enforce a contract that merely requires the parties to discuss their differences. *Id.* The absence of a provision in the grievance procedure for a final and binding decision is what distinguishes *Brown* from the present case. The agreement between Sun and the Association expressly provides that the decision made in the last step is final.

The rudimentary grievance procedures at issue it the two Tenth Circuit decisions cited by Roberts,[5] neither of which include the authority to make a final and binding decision, distinguish those cases from the present case. Likewise, the lack of authority to make a final and binding decision under the grievance procedure in *Smith v. Kerrville Bus Co.*, 748 F.2d 1049 (5th Cir. 1984), cited by Roberts, distinguishes it from the Fifth Circuit case of *Haynes*.

The circuits have consistently held that a litigant may not use the absence of a provision for binding arbitration in a grievance procedure as the basis for reexamining the

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[5] Petition for Writ of Certiorari, p. 9, citing *United Brotherhood of C & J v. Hensel Phelps Construction Co.*, 376 F.2d 731 (10th Cir. 1967) and *Line Drivers Local No. 961 v. W. J. Digby, Inc.*, 341 F.2d 1016 (10th Cir. 1965).

merits of the grievance where the grievance procedure provides for a final and binding decision.

## CONCLUSION

There is no split of authority among the circuits as asserted by Roberts. There are no "special and important reasons" for this Court to grant the petition. For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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